RECORD AND BRIEFS

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In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA INC.,
PETITIONER

v.

SARA PARKER PAULEY, DIRECTOR OF THE MISSOURI DEPARTMENT OF NATURAL RESOURCES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES, ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND SEVENTEEN INDIVIDUAL RELIGIOUS COLLEGES AND UNIVERSITIES SUPPORTING PETITIONER

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QUESTION PRESENTED

Does the exclusion of religious institutions from otherwise generally available government aid violate the Free Exercise and Equal Protection Clauses?

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Rosenberger v. *Rector and Visitors of Univ. of Va.*,
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Kuchler,
One Heart: Universal Wisdom from the World's Scriptures 110 (2003) 13

Paige, et al.,
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Phillips,
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Trozzolo and Brandenberger,
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Tuttle,
The Effects of Short-term Mission Experienced on College Students' Spiritual Growth and Maturity,
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Wright,
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Other Authorities

Birkley,
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Brief of Amici Curiae Religious Colleges and Universities,
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Pérez-Peña, *Muslims From Abroad Are Thriving in Catholic Colleges*, N.Y. Times (Sep. 2, 2012) 12

Platt, *Bad Apples: The "Right to Discriminate" in Schools*, Public Rights, Private Conscience Project (Dec. 16, 2015) 22

Quran 17:26 9

Rocheleau, *Accrediting agency to review Gordon College*, Boston Globe (July 11, 2014) 23

Segreti, *Religious leaders in rare union with pledge to fight slavery*, Financial Times (Dec. 3, 2014 10:18 AM) 14

SFGate, Feds take over student loan program from banks, (Mar. 30 2010) 17

Shaw, *Federal Funding Is Not a Form of Religious Liberty* Huffington Post (Dec. 17, 2015, 2:40PM) 21

St. John of the Cross, *Dichos* 64 9

The New England Primer (1777 ed.) 26

The Princeton Review, *The Gap Year Experience: A Life-Changing Opportunity* 11

Transcript of Oral Argument on Question 1 at 36-38, *Obergefell* v. *Hodges*, 135 S.Ct. 2584 (No. 14-566) (2015) 20

Tucker, *How MLK's Faith Influenced His Public Life*, The Daily Signal (Jan. 20, 2014) 14

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

At first blush, this may appear to be a case about the demands of the First and Fourteenth Amendments in the narrow context of religious primary and secondary education. After all, the petitioner is a church that sought (limited) state assistance in connection with its school playground. And the denial of that assistance was based on a state law—one of many Blaine Amendments adopted in various states in the late 1800s and early 1900s—designed precisely to thwart public assistance for Catholic primary and secondary schools.

For two reasons, though, the resolution of this case has substantial implications for American religious higher education, represented here by three *amici* associations that collectively represent hundreds of U.S. religious colleges and universities, and by a number of individual institutions, all described in the Appendix.[2] First, whatever principle this Court applies in deter-

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[1] No one other than *amici*, their members and counsel authored any part of this brief or made a contribution to fund its preparation or submission. Counsel for all parties have consented to the filing of this brief in communications on file with the Clerk.

[2] The associational *amici* are: The Association of Catholic Colleges and Universities, The Council for Christian Colleges and Universities and The General Conference of Seventh-day Adventists. The individual *amici* are: Azusa Pacific University, Biola University, Brigham Young University, Brigham Young University-Hawaii, Brigham Young University-Idaho, Loma Linda University, Liberty University, The University of Notre Dame, Oklahoma Christian University, Oklahoma Wesleyan University, Oral Roberts University, Patrick Henry College, Regent University, Southern Virginia University, Union University, William Jessup University and Wheaton College.

mining whether Missouri has violated the federal Constitution in denying the assistance at issue here will likewise apply to disputes about governments' ability to discriminate against religious colleges and universities in the allocation of myriad forms of government assistance. Second, on a variety of topics, there exists in today's society an apparently escalating conflict between religious and secular norms, combined with a reduced cultural commitment to neutrality and pluralism. That dynamic creates a heightened risk that, as with the Blaine amendments of yesteryear, those opposed to some of the values widely embraced by today's religious colleges and universities will seek to exclude them from a variety of governmental programs—including some that are critical to these institutions' ability to carry out their educational missions.

That risk to religious higher education is made even more potent by a common misinterpretation of *Locke* v. *Davey*, 540 U.S. 712 (2004). In holding that a state could exclude ministerial training from a generally available scholarship program without running afoul of the First and Fourteenth Amendments, *Locke* reasoned that the religious discrimination at issue there was justified by a long-standing tradition—going back to the founding era—of avoiding governmental funding of ministerial training. Unfortunately, as this case illustrates, *Locke* has been misunderstood by some courts and governments as authorizing more *general* discrimination against religious institutions in government assistance or contracts. And that mistaken reading of *Locke* appears to underlie a number of recent decisions by government functionaries excluding or threatening to exclude religious institutions—including religious colleges—from otherwise generally available government programs.

Only this Court can re-establish *Locke's* narrow scope and thus protect religious institutions of all kinds—including colleges and universities—from the kinds of discriminatory policies approved in the decision below and others like it. And the Court can do so by reaffirming a neutrality principle, consistent with *Locke,* forbidding religious discrimination in the allocation of government benefits and contracts in all but the narrowest of circumstances.

STATEMENT

This case presents a classic example of discrimination against a religious institution in the allocation of government benefits or contracts.

1. The Learning Center, a preschool owned by petitioner Trinity Lutheran Church, applied for state funding to purchase recycled tires for resurfacing a playground. Pet. App. 97a-99a. In so doing, petitioner identified the numerous secular benefits the resurfacing would provide to the preschoolers who use the playground. Pet. Cert. 5-7; Pet. Br. 3-7. Petitioner applied for funding through a competitive process to The Missouri Department of Natural Resources (DNR). Pet. Cert. 7; Pet. Br. 6. But invoking the Missouri Constitution, the DNR nonetheless denied petitioner's application solely because petitioner is a church rather than a secular organization.

2. Missouri's Constitution contains a "Blaine Amendment," which forbids government funding to "aid . . . any church, sect, or denomination of religion." Mo. Const. Art. I § 7. The original effect—and apparent goal[3]—of such Blaine Amendments was to promote

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[3] See generally Steven K. Green, *The Blaine Amendment Reconsidered,* 36 Am. J. Legal Hist. 38 (1992).

the Protestant faith through public schooling while denying funding for Catholic schools.

But this case is not about government favoring one religion, like Protestants. Rather, in this case DNR understood Missouri's Blaine Amendment as forcing DNR to withhold funding that is widely available to secular preschools from preschools run by churches of *any* faith. See Pet. Resp. 1-2; Pet. App. 153a.

3. Trinity Lutheran sued DNR, asserting claims under the Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause. See Pet. App. 116a (complaint). The district court dismissed these claims based on this Court's 2004 decision in *Locke* v. *Davey*, 540 U.S. 712 (2004). Pet. App. 34a, 51a-52a. The district court claimed petitioner's request presented "antiestablishment concerns . . . at least comparable to those relied on by the Court in *Locke*." Pet. App. 54a. The court acknowledged those concerns did not necessarily rise to an Establishment Clause violation. But it nevertheless claimed they were sufficient to justify excluding petitioner from participating in the grant program. Pet. App. 56a

4. A majority of the Eighth Circuit affirmed. Pet. App. 1a, 5a-12a. Judge Gruender dissented, finding that the antiestablishment interests were near their pinnacle in *Locke*, and that the antiestablishment interests in this case were not as strong. Pet. App. 28a. He doubted that the *Locke* Court would have considered "a state's interest in not rubberizing a playground surface with recycled tires" as a strong Establishment Clause interest. Pet. App. 29a. While acknowledging that the precise boundaries of *Locke* are "far from clear," he concluded that the district court should not have dismissed petitioner's claims. Pet App. 30a-31a.

SUMMARY OF ARGUMENT

I. The decisions below—and others like them around the country—represent a serious and even existential threat to U.S. religious higher education. For if the church in this case can be discriminated against based on its religious character, so also can a religious college or university be discriminated against in the allocation of government-related benefits that are critical to its success—such as student loans and grants, tax exemptions, accreditations and research contracts.

The resulting weakening of religious higher education would be an enormous loss. As Congress has recognized, religious colleges provide unique social benefits. Beyond academic excellence, these institutions offer students superior opportunities to integrate community service into their educations, to enjoy the physical and emotional safety that generally prevail in communities bound together by a common religious ethic, and to learn in an atmosphere of greater philosophical and political diversity than that offered in most secular institutions. See, *e.g.*, 154 Cong. Rec. H7658-03 (2008) (community service); 20 U.S.C. § 1011a(a)(2) (diversity). Accordingly, the mere existence of religious colleges and universities adds valuable diversity to higher education in general. See *id.*

Unfortunately, in addition to the decisions in this case, other courts and governments have interpreted this Court's decision in *Locke* v. *Davey* as a license to discriminate against religious educational institutions based on their religious character. For example, the Kentucky Supreme Court recently relied upon *Locke* in upholding the application of Kentucky's Blaine Amendment to prohibit tax-exempt bond financing of a pharmacy school at a religious college. *University of*

the Cumberlands v. *Pennybacker*, 308 S.W.3d 668 (Ky. 2010). The court claimed that, under *Locke*, governments can rely upon "antiestablishment interests" to prohibit *any* governmental financial benefit to religious colleges—even where such a prohibition results in rank religious discrimination. *Id.* at 680. And of course, the denial of such generally available benefits harms religious higher education by putting religious institutions at a substantial disadvantage compared to their secular counterparts.

II. To prevent further harm to religious higher education, *amici* respectfully ask this Court to clarify that *Locke* is not, after all, an open invitation to discriminate against religious institutions based on their religious character. Or, as Judge Gruender put it, "*Locke* did not leave states"—or other governmental or quasi-governmental entities—"with unfettered discretion to exclude the religious from generally available public benefits." Pet. App. 26a.

Instead, as a general rule, the proper standard for adjudicating claims of the sort raised here—and in *University of the Cumberlands*—is strict neutrality between religious and secular groups. Governments can depart from this general rule and discriminate against religious institutions *only* when such discrimination falls squarely within a well-established tradition going all the way back to the adoption of the First Amendment, as the Court held it did in *Locke*. Otherwise, the First and Fourteenth Amendments require that religious schools—like petitioner and *amici*—be treated no worse than their secular counterparts. As this Court put it in *Employment Division* v. *Smith*, 494 U.S. 872, 877 (1990), "[t]he government may not . . . impose special disabilities on the basis of religious views *or* religious status."

ARGUMENT

I. Religious Colleges And Universities, Which Benefit Society In Numerous Ways, Would Suffer Serious Harm Under The Misinterpretation Of *Locke* Embraced By The Courts Below And Other Courts And Agencies.

The Court's decision in this case is exceptionally important, not just to the development of constitutional doctrine, but also for its practical impact on religious colleges and universities throughout the Nation. In numerous ways, these institutions benefit American higher education and, hence, American society. But the lower court's erroneous and overbroad interpretation of *Locke*—an interpretation similar to those adopted by other courts and government agencies—would justify governmental discrimination against religious colleges across a range of important matters. Such discrimination would seriously weaken those colleges, perhaps driving some out of higher education altogether, and would thereby threaten the many benefits they provide.

A. Religious colleges and universities bring unique benefits – including much-needed diversity – to American higher education.

Religious institutions of higher education provide unique benefits to American society. To be sure, they offer students scholastic opportunities competitive with (and often superior to) those at non-religious schools, whether private or public. But beyond academic excellence, religious colleges and universities offer students advantages that often are not as readily available in secular institutions. Three of those are (1) the opportunity for students to naturally integrate community service into their education; (2) the greater

physical safety offered by communities bound together by a common religious ethic; and (3) a broader diversity of philosophical and political perspectives among professors and students.

1. Congress recognized the value of religious colleges and universities in enabling students to integrate community service into their educational pursuits when it enacted the Higher Education Opportunity Act of 2008, Public Law 110-315 (2008). Among other things, that law requires that accrediting bodies "respect the . . . religious missions" of colleges and universities. *Id.* Moreover, noting that "[t]he time to recognize and encourage an increased commitment to public service is now," the House Report on that Act specifically mentioned as one of its policy rationales the increasing number of students at religious colleges who serve religious missions or perform other kinds of service. See 154 Cong. Rec. H7658-03 (2008). That comment reflects the reality that creating enhanced opportunities for community service is one key respect in which those colleges contribute to the common good.[4]

Nor is it an accident that religious colleges tend to foster community service. Students and professors in these institutions are far more likely to accept the in-

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[4] Indeed, many state and federal programs encourage college students to provide such service. See, *e.g.*, Corp. for Nat'l and Cmty. Serv., *National Service in Your State (2014-2015)*, http://www.nationalservice.gov/impact-our-nation/state-profiles (providing information for national and state service initiatives focused on incentivizing and promoting young adults between the ages of eighteen to twenty-four to combine education and community outreach).

junctions in their foundational religious texts, traditions and teachings to take care of the foreigner, the poor and the needy.[5] And they are more likely to embrace the challenging principle that the value of one's life is measured not primarily by what one achieves in a secular occupation, but by how well one serves others.[6]

Thus, for instance, a sociology major in a Jewish college might find inspiration in the Book of Exodus to study and address the plight of refugees from war-torn lands.[7] Or a student in a Muslim school might be led by the Quran to investigate the factors influencing immigration, and then look for opportunities to serve local immigrants.[8] Or a Catholic law student might be moved by the New Testament to provide *pro bono* assistance to unwed mothers or crisis pregnancy centers.[9]

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[5] See, *e.g.*, Deuteronomy 10:18-19 ("He executes justice for the fatherless and the widow, and loves the sojourner, giving him food and clothing. Love the sojourner, therefore; for you were sojourners in the land of Egypt.").

[6] See, *e.g.*, St. John of the Cross, *Dichos* 64 ("At the evening of life, we shall be judged on our love."), quoted in *Catechism of the Catholic Church*, art. 1022.

[7] See, *e.g.*, Exodus 22:21 ("Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.").

[8] See, *e.g.*, Quran 17:26 ("Give ... to the needy and the wayfarers.").

[9] See, *e.g.*, Matthew 25:35-40 (Jesus's command to treat "the least of these" as if they were Jesus himself); James 1:27 ("Religion that is pure and undefiled before God and the Father is this: to visit orphans and widows in their affliction, and to keep oneself unstained from the world.").

In fact, studies show that students at religious colleges tend to spend more of their time in community service than students at non-religious colleges, public or private.[10] Students at such colleges frequently take time off from their educations for domestic or overseas public service,[11] thanks in part to institutional policies and accommodations designed to encourage such service.[12] It is also common for students who don't serve

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[10] See Elizabeth Weiss Ozorak, *Love of God and Neighbor: Religion and Volunteer Service Among College Students*, 44 Rev. of Religious Research 285, 289-91 (2003) (college students were far more likely to engage in volunteer activity when they were actively religious and participated in religious worship); Thomas A. Trozzolo & Jay W. Brandenberger, *Religious Commitment and Prosocial Behavior: A Study of Undergraduates at the University of Notre Dame*, 2 Center for Social Concerns 1, 3-4 (2001) (positive correlation between religious university and prosocial behavior, including volunteer work).

[11] George S. Wood, *Faith Development of Christian College Students Engaged in a One-Month Study Abroad Mission Trip*, Doctoral Dissertations of Ball State University (1999); See Kathryn A. Tuttle, *The Effects of Short-term Mission Experienced on College Students' Spiritual Growth and Maturity*, 4NS Christian Education Journal 123 (2000) (Series 2); Adventures, https://www.adventures.org/trips/?prg=passport (last visited April 15, 2016); Orphan Outreach, http://www.orphanoutreach.co/mission-trips/short-term-mission-trips.asp (last visited April 15, 2016); Brigham Young University, *Percentage of Students who Have Served Missions*, http://yfacts.byu.edu/Article?id=264 (last visited April 15, 2016).

[12] See La Sierra University Student Missions, https://lasierra.edu/missions/ (last visited April 15, 2016); Office of Campus Ministries, Andrews University *Missions*, https://www.andrews.edu/cm/change/missions/about/ (last visited April 15, 2016); Brigham Young University, *Mission Deferments*, https://admissions.byu.edu/mission-deferments (last visited April 18, 2016).

traditional missions to volunteer in foreign countries while studying abroad.[13]

All such humanitarian work serves not only to benefit specific religious groups, but also to reduce cultural divides between nations and religions. That too benefits both students and the world community.

2. Religious colleges and universities also provide some of the safest places for learning and academic inquiry. For instance, in a recent study of campus safety, Regent University, Summit University and Brigham Young University—all private, religious institutions—were named the safest in the nation.[14] Indeed, of the top twenty-five safest universities, eighteen (or 72 percent) are religious.[15] And colleges classi-

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[13] See R. Michael Paige, Gerald W. Fry, Elizabeth M. Stallman, Jasmina Josic, and Jae-Eun Jon, *Study Aboard for Global Engagement: The Long Term Impact of Mobility Experiences*, 20 Intercultural Education 529 (2009); Global Volunteers, https://globalvolunteers.org/students/ (last visited April 15, 2016); Megan Heise, *Tips for College Students Before, During, and After Volunteering Abroad*, Go Overseas (July 16, 2013), http://www.gooverseas.com/blog/tips-college-students-volunteer-abroad; Princeton Review, *The Gap Year Experience: A Life-Changing Opportunity*, http://www.princetonreview.com/study-abroad/college-abroad/gap-year (last visited April 20, 2016).

[14] Tanya Loudenback, *The 25 safest college campuses in America*, Business Insider (Jan. 12, 2016), available at: http://www.businessinsider.com/safest-college-campuses-in-america-2016-1.

[15] *Id. see also* Niche, *Safest College Campuses*, available at: https://colleges.niche.com/rankings/safest-colleges/ (another permutation of same rankings). The sources for these numbers include Department of Education data reported under the Clery Act, as well as students' self-reported perceptions of safety. *Id.* (under the link "[s]ee how this rating was calculated").

fied as "most religious" consistently report much lower rates of sexual assault than the national average.[16]

Accordingly, for students and parents concerned about physical safety, religious colleges and universities can be a very attractive option.[17] And the mere existence of such options in the market for higher education helps ensure that other institutions place greater emphasis on student safety.

3. Perhaps most importantly, religious colleges contribute substantially to the diversity of American higher education. In most religious traditions, the call to faith is a challenge to think and live differently from the rest of society. From the Islamic command to "[b]e in the world as if you were a stranger or traveler" to Jesus' command that his disciples be "a light to the world,"[18] people of faith are encouraged to transcend

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[16] EDSmart, College Sexual Assault Statistics of Top Ranked Schools 2015 http://www.edsmart.org/college-sexual-assault-statistics-top-ranked-schools/#stats (last visited April 20, 2016).

[17] Indeed, for these and other reasons, even though there are few American colleges in the Islamic faith tradition, Muslim students are increasingly flocking to universities run by other faiths. See, *e.g.*, Richard Pérez-Peña, *Muslims From Abroad Are Thriving in Catholic Colleges*, N.Y. Times (Sep. 2, 2012), available at: http://www.nytimes.com/2012/09/03/education/muslims-enroll-at-catholic-colleges-in-growing-numbers.html (noting fondness of Muslim students for "the prevalence of . . . single-sex dorms" and "a place where talk of religious beliefs and adherence to a religious code are accepted and even encouraged").

[18] See also Bonnie Louise Kuchler, *One Heart: Universal Wisdom from the World's Scriptures* 110 (2003) (citing a hadith of an Islamic scholar that encourages to "[b]e in the world as if you were a stranger or traveler"); Avi Lazerson, *Holiness and Judaism*, Jewish Magazine (2001) (online publication), http://www.jew-

the cultures in which they live. Throughout the Nation's history, this effort to live differently has suffused numerous religious schools—compelling them, for example, to help lead the fight against slavery and racial discrimination.[19] Thus, it should come as no surprise

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ishmag.com/39mag/holy/ holy.htm (interpreting the Torah to direct Jews to "liv[e] in this world, marrying, procreating, working and at the same time not to be affected by the daily worldly occurrences"); Matthew 5:14-15 (Jesus commands his followers to be a "light" to the world); David Peterson, *Worship and Ethics in Romans 12*, 44 Tyndale Bulletin 271, 282 (1993) http://www.tyndalehouse.com/TynBul/Library/TynBull_1993_44_2_04_Peterson_WorshipInRom12.pdf (interpreting Romans 12:2 to direct Christians to "yield to the power of God and his norms, rather than to the influence of this age and its norms."); Chris Wright, *What Difference Does Religion Make?* 14 (2002) (interpreting Dhammapada 171 to instruct Buddhists that the "way to end unhappiness and suffering is to stop clinging to things [of the world]").

[19] For example, Yale College, then a religious school, produced numerous prominent abolitionists. Yale, Slavery, and Abolition, *The Story of Yale Abolitionists* (last visited April 18, 2016), http://www.yaleslavery.org/Abolitionists/abolit.html; see also Bertram Wyatt-Brown, *American Abolitionism and Religion*, Divining America: National Humanities Center (last visited April 18, 2016), http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/amabrel.htm (detailing the involvement of religion generally in the fight against slavery). Later, most historically black colleges and universities were established by churches. Inspired by their religious beliefs, current and former students of these colleges (including Reverend Martin Luther King, Jr.) played a critical role in the civil rights movement. *Id.*; see also Rich Tucker, *How MLK's Faith Influenced His Public Life*, The Daily Signal (Jan. 20, 2014), http://dailysignal.com/2014/01/20/mlks-faith-influenced-public-life/; Jill Silos-Rooney, *The Civil Rights Movement, HBCUs, and You*, HBCU Lifestyle (Feb. 1, 2014), http://hbculifestyle.com/hbcu-civil-rights-movement.

that educational institutions founded and run by religious groups offer perspectives and emphases that differ, sometimes dramatically, from those offered by other educational institutions.

One illustration of that diversity is found in studies of professors' political affiliations and views. Overwhelmingly, most professors who teach in colleges and universities consider themselves politically "liberal."[20] And in one study of political donations by professors affiliated with some 150 colleges and universities, only nine were classified as having an average donation rating at or to the "right" of what the study deemed the political center.[21] Each of these nine more centrist

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Today, religious schools continue to fight modern-day slavery in foreign lands. See, *e.g.*, Giulia Segreti, *Religious leaders in rare union with pledge to fight slavery*, Financial Times (Dec. 3, 2014 10:18 AM), http://www.ft.com/cms/s/0/438d6d48-7ac4-11e4-b630-00144feabdc0.html; Amy Harrison, *BYU students fight global issue of human trafficking*, The Daily Universe (Jan. 15, 2013), http://universe.byu.edu/2013/01/15/byu-students-fight-global-issue-of-human-trafficking1.

[20] Cf., *e.g.*, James C. Phillips, *Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Explanation of Three Hypothesis*, 39 Harv. J. L. Pub. Pol. 153, 154 nn. 2-4 and accompanying text (2016) (documenting overwhelmingly liberal affiliation of professors in social science and law); Pascal-Emmanuel Gobry, *How academia's liberal bias is killing social science*, The Week (Dec. 17, 2014), http://theweek.com/article/index/273736/how-academiasliberal-bias-is-killing-social-science.

[21] Crowdpac.com, *How liberal or conservative is your university?*, available at: https://www.crowdpac.com/games/lookup/universities (last visited April 20, 2016). For a reference point, the scale utilized by the study suggests that all but two of 334 cataloged Republican candidates for federal office are right of political center, and all 263 Democratic candidates are left of political center.

schools—as measured by their professors' political views—has some religious affiliation. On the other hand, Brandeis University, which also boasts a long religious heritage, attracts professors whose donations are, on average, the 23rd most liberal of the collection of 150 colleges.[22] In short, religious colleges and universities have value in part because they tend to attract professors and students from across the political spectrum, rather than from one part of it.

Because of this reality, religious colleges are more likely than most to provide students extensive exposure to the full range of political views. And that includes not only the more "conservative" views that, for whatever reason, are missing in many non-religious institutions, but also more progressive views, leavened by religious perspectives.

The diversity that religious colleges add has long been understood and valued by Congress. As it said in the Higher Education Opportunity Act, "[i]t is the sense of Congress that [] the diversity of institutions and educational missions is one of the key strengths of American higher education." 20 U.S.C. § 1011a(a)(2). Consistent with that view, the provision further urged that "individual institutions of higher education have different missions and each institution should design its academic program in accordance with its educational goals." *Id.*

In short, just as this Court has recognized that racial diversity and other forms of diversity are valuable

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See Crowdpac.com, *Candidates*, available at https://www.crowdpac.com/candidates (last visited April 20, 2016).

[22] Crowdpac.com, *Brandeis University*, available at: https://www.crowdpac.com/games/lookup/universities? name= Brandeis%20University.

in any given educational institution, see *Grutter* v. *Bollinger*, 539 U.S. 306, 343 (2003), Congress has recognized that diversity *among* educational institutions is valuable in higher education as a whole.

It is not difficult to see how these unique benefits offered by religious colleges and universities could be gravely imperiled by the overbroad view of *Locke* espoused by the lower courts in this case. That mistaken interpretation could justify governments at any level in excluding religious institutions from otherwise available benefits such as student loan programs. It could even allow accrediting agencies to disqualify religious institutions based on their unique religious views. Such unfair discrimination, grounded in a misreading of *Locke*, would place those institutions at a severe disadvantage compared to their secular counterparts, eroding the needed diversity that these institutions bring to American higher education. And this is why *amici* are deeply concerned about the lower courts' decisions in this case.

B. Recent misinterpretations of *Locke* and related Establishment Clause precedents would permit governmental discrimination against religious colleges across a range of important matters.

The Eighth Circuit is not alone in misinterpreting *Locke*. In cases arising out of the inevitable interactions between government and religious schools, other courts, governments and agencies have also read *Locke* far too broadly, as countenancing general discrimination against religious institutions in access to otherwise generally available public benefits and contracts.

1. To succeed in their missions, religious universities and colleges must regularly interact with governments at every level. Indeed, many of the *essential* aspects of operating any school of higher education—such as obtaining necessary permits, becoming and remaining accredited, or finding loans for students—are regulated in whole or in part by governmental bodies.[23] Such regulation also governs financial and other benefits such as academic recognition and benefits paid with taxpayer dollars.[24] And of course, religious colleges are subject to other regulations applicable to colleges and universities generally—such as the federal Clery Act, which requires all colleges to report many details regarding on-campus crime,[25] and state and local environmental regulations.[26]

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[23] See, *e.g.* Washington State Dept. of Health, *Food Worker Card*, available at: http://www.doh.wa.gov/CommunityandEnvironment/Food/FoodWorkerandIndustry/FoodWorkerCard (all workers must have food permits); Department of Education, *Overview of Accreditation in the United States*, http://www2.ed.gov/admins/finaid/accred/accreditation.html#Overview (last visited April 18, 2016); SFGate, Feds take over student loan program from banks, (Mar. 30 2010), available at: http://www.sfgate.com/business/networth/article/Feds-take-over-student-loan-program-from-banks-3193888.php.

[24] See, *e.g.*, Federal Student Aid, *Federal Pell Grants*, available at: https://studentaid.ed.gov/sa/types/grants-scholarships/pell. And in order to receive Title IV funds, schools must sign a Program Participation Agreement. 34 C.F.R. § 668.14. In addition, schools must report survey date to the Integrated Postsecondary Education Data System (IPEDS). See IPEDS, *Form, Instructions, FAQs, Narrative Edits and Import Specifications*, available at: https://surveys.nces.ed.gov/ipeds/visresults.aspx.

[25] 20 U.S.C. § 1092 (f).

[26] See, *e.g.*, Cal. Code Regs tit. 24 (containing building codes).

These realities make the overbroad reading of *Locke* by the court below and others highly dangerous to religious schools. Such a reading offers a blueprint for governments to use Blaine Amendments or similar laws to deny benefits or even necessary approvals to religious colleges and universities—either because they are religious, or because they adhere to tenets with which the governmental bodies disagree.[27]

2. One area of immediate concern to many religious colleges is the tax-exempt bond financing that is generally available to institutions of higher education. Expressly relying on *Locke*, the Kentucky Supreme Court recently upheld the application of a Blaine Amendment to prohibit tax-exempt bond financing of a pharmacy school at a religious college. *University of the Cumberlands* v. *Pennybacker*, 308 S.W.3d 668 (Ky. 2010) . The Court claimed that "antiestablishment interests" in prohibiting *any* funding to religious colleges are akin to the interests regarding the hiring of clergy in *Locke*. *Id.* at 680. And, much like the lower courts in this case, the Kentucky Supreme Court concluded that the financial benefit inherent in tax-exempt financing violated that state's Blaine Amendment, and that this discrimination against a religious college was allowed by *Locke*.

Such an extension of *Locke* allows local governments—including courts—to penalize religious colleges simply for being religious. It is thus a formidable

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[27] This is not to suggest that all Blaine Amendments can or should be interpreted to ban financial aid—or aid of any sort—to religious schools. But the same constitutional interpretation that would enable Missouri to use a Blaine Amendment to deny funding for using recycled tires to refurbish a playground could likely be used to allow any government to deny to religious colleges this plethora of essential governmental services and benefits.

threat to the diversity and other benefits these institutions offer.

3. Other courts—including several federal circuits—have likewise read *Locke* as validating a general hostility to religion as a legitimate "anti-establishment interest." Courts have thus found that governments have a legitimate interest in forbidding the following types of benefits to religious schools:

- state scholarship funds used for both religious and secular primary and secondary schools, see *Eulitt ex rel. Eulitt* v. *Maine Dept. of Educ.*, 386 F. 3d 344, 349 (1st Cir. 2004);
- the use of school buildings for religious services after hours, even when secular groups are allowed to make analogous use of the buildings, see *Bronx Household of Faith* v. *Bd. of Educ.*,750 F.3d 184, 187-188 (2d Cir. 2014), *cert. denied,* __ U.S. __ (2015);
- publicly funded placements of at-risk youth in social service programs that include religion, see *Teen Ranch Inc.* v. *Udow*, 479 F.3d 403, 409-412 (6th Cir. 2007); and
- acceptance of religion classes at religious schools in satisfaction of course requirements for college admission, see *Ass'n of Christian Schs. Int'l* v. *Stearns*, 362 F. App'x 640, 645-646 (9th Cir. 2010).

Such decisions are of great concern to religious colleges and universities, for they imply that governments have a legitimate, general "anti-establishment interest" in treating religious institutions *worse* than similarly situated secular institutions. Rather than embracing pluralism, this approach reflects a return to

the forced orthodoxy and sectarian bias of the Blaine Amendment era.

4. A related area of concern is equal access to tax exemptions and other financial benefits. The Solicitor General put this issue on the table in this Court just last year when asked at oral argument whether a religious school's tax exemption could be revoked based on its beliefs and practices about marriage. His forbidding response was that "it is going to be an issue."[28] And it certainly will be "an issue" if *Locke* provides as broad a mandate for religious discrimination as the lower courts in this case believed.

Some have even advocated denying religious colleges other forms of taxpayer assistance, such as government contracts, Pell grants, and student loans.[29] For example, a California State Assembly bill introduced earlier this year would prohibit students from using "Cal Grants"—funds provided to low income students who might not otherwise be able to afford a higher education—at any institution that has applied for a waiver by the U.S. Department of Education from Title IX's nondiscrimination requirements.[30] Although the religious exemption from Title IX has been

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[28] Transcript of Oral Argument on Question 1 at 36-38, *Obergefell* v. *Hodges*, 135 S.Ct. 2584 (No. 14-566) (2015); *see also Obergefell*, 135 S. Ct at 2626 (Roberts, C.J., dissenting).

[29] See Letter from Stanley Carlson-Thiess, et al. to President Obama, Sep. 10, 2015, available at: http://www.irfalliance.org/wp-content/uploads/2015/09/Letter-to-President-to-maintain -OLC-memo-9-10-2015.pdf; Susan M. Shaw, *Federal Funding Is Not a Form of Religious Liberty* Huffington Post (Dec. 17, 2015, 2:40PM), available at: http://www.huffingtonpost.com/susan-m-shaw/federal-funding-is-not-religious-liberty_b_8813740.html.

[30] Assemb. B. 1888, 2015-2016 Leg. (Cal. 2016).

available for decades, and is deemed essential to many schools' ability to operate in accordance with their religion, religious colleges in California may soon lose state financial benefits—available to non-religious institutions—simply for invoking that established federal right.

Whether tax-exempt status and other generally available benefits will be available for religious colleges largely depends on how this Court interprets *Locke*. For reasons detailed below, this Court should explain that *Locke* in no way sanctions the kind of blatant religious discrimination represented by these calls to end various benefits to religious institutions.

5. Accreditation is another area of concern. True, as noted previously, an important provision of the 2008 Higher Education Opportunity Act requires accreditation bodies to "respect" religious colleges' "religious missions."[31] Nevertheless, calls for accreditation bodies to ignore religious missions and impose contrary secular norms continue.[32] And a broad interpretation of *Locke* would embolden those who seek to deprive religious colleges of accreditation based on the good-faith pursuit of their religious missions.[33]

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[31] Higher Education Opportunity Act, Public Law 110-315 (2008), *codified at* 20 U.S.C. § 1099b(c), (a)(4)(A).

[32] Some have even suggested that schools obtaining routine waivers from the Department of Education should be subject to accreditation complaints. See, e.g., Andy Birkley, *Dozens of Christian schools win Title IX waivers*, The Column (Dec. 1, 2015), available at: http://thecolu.mn/21270/dozens-christian-schools-win-title-ix-waivers-ban-lgbt-students.

[33] See, *e.g.*, *id.*; Peter Conn, *The Great Accreditation Farce*, The Chronicle of Higher Education (June 30, 2014), http://chronicle.com/article/The-Great-Accreditation-Farce/147425/; Parker

One recent example is the debate involving the president of Gordon College, who signed a letter advocating for "banning discrimination" through an executive order while at the same time allowing exemptions from that order—so that "an extension of protection for one group not come at the expense of faith communities."[34] The response to this thoughtful letter was swift: At least one local government canceled an important contract with the college,[35] the media criticized it for its stance on historical Christian principles of sexual morality, and its regional accreditation was called into question.[36] While the college was eventually able to maintain its accreditation, the episode was a stark reminder that a broad reading of *Locke* would make it easier for the enemies of religious colleges—in

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Wishik, *Gay Student Expelled from U. the Cumberlands; School May Lose Funding*, N.Y. Times (May 4, 2006), available at: http://www.nytimes.com/uwire/uwire_HYNC050420062147263.html; Elizabeth Reiner Platt, *Bad Apples: The "Right to Discriminate" in Schools*, Public Rights, Private Conscience Project (Dec. 16, 2015) available at: http://blogs.law.columbia.edu/publicrightsprivateconscience/2015/12/16/bad-apples-the-right-to-discriminate-in-schools.

[34] Letter from Joel C. Hunter, et al. to President Obama, July 1, 2014, available at: http://bit.ly/ExemptionLetter.

[35] The local school district voted to end a long-standing partnership with the college under which its education students did their student teaching in the district. Oliver Ortega, *Lynn public schools sever relationship with Gordon College*, Boston Globe (Aug. 30, 2014) available at: https://www.bostonglobe.com/metro/2014/08/29/lynn-public-schools-sever-relationship-with-gordon-college/aw1KwO4RGVpn284rR1jTgO/story.html.

[36] Matt Rocheleau, *Accrediting agency to review Gordon College*, Boston Globe (July 11, 2014), available at: http://bit.ly/AgencytoReview.

a variety of circumstances—to attack their accreditation.

If *Locke* were interpreted to allow governments or quasi-government agencies like accrediting bodies to discriminate against religious colleges, the consequences would be sweeping. Under this reading of *Locke*, students (and their parents) would find less diversity in the marketplace of higher education. And the upshot would likely be increased social strife over religion and religion-related issues, as ever-more intrusive governments seek to penalize religious colleges for not pursuing whatever objectives the government deems most important at the time. Such "divisiveness based upon religion [would] promote[] social conflict, sapping the strength of government and religion alike." *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

II. This Court Should Adopt A Neutrality Principle Under Which Religious Discrimination In The Allocation Of Government Benefits Is Constitutionally Permissible Only In The Kinds Of Narrow Circumstances Presented In *Locke*

Principles already established in this Court's precedent mark a roadmap for avoiding the problems outlined above. As this case is far outside the realm of *Locke*, the relevant case law dictates that the proper rule in this case and others like it a rule of genuine neutrality between secular and religious organizations.

A. Whether or not *Locke* was correct, its holding was expressly limited to the denial of government funding for training clergy, and its reasoning supports a general principle of neutrality in access to government benefits.

Some of the *amici* here have previously expressed skepticism about the rule adopted in *Locke*.[37] But whether or not *Locke* was correctly decided, its approval of religious discrimination was expressly limited to the specific type of discrimination there. And in other respects, *Locke supports* a general rule of neutrality as between secular and religious institutions.

1. The issue in *Locke* was whether a state that offered scholarships for students seeking almost all college degrees could deny such scholarships to students seeking a degree in devotional theology, *i.e.*, training for the ministry. 540 U.S. at 715. In ruling that Washington could forbid that specific use of its scholarships, the Court found that the funding of devotional degrees

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[37] See Brief of Amici Curiae Religious Colleges and Universities, *Locke* v. *Davey*, 540 U.S. 712 (2004).

is a form of funding for training ministers, the avoidance of which the Court deemed a legitimate "anti-establishment interest." *Id.* at 722.

In support, the Court cited early state constitutions demonstrating the widespread nature of this concern at the Nation's founding. 540 U.S. at 723. Because prohibiting the funding of ministers is a classic anti-establishment interest, the Court held, "[t]he State's interest in not funding the pursuit of devotional degrees is substantial." *Id.* at 725. That specific interest, the Court held, justified the religious discrimination challenged in that case—that is, denying funds for ministerial training. And the Court explicitly limited its holding to those facts, declining to "venture further into this difficult area." *Ibid.*.

2. Still, three aspects of *Locke's* subsidiary reasoning support a general rule of neutrality as between non-religious and religious institutions.

First, as noted, the Court held that only a very narrow interest—avoiding the funding of ministerial training—could justify the religious discrimination in Washington's scholarship program. The court did not rely upon a general interest in avoiding the "promotion" or "endorsement" of religion, or even a general principle of avoiding any form of direct or indirect financial assistance to religion. Thus, the holding and rationale of *Locke* are entirely compatible with a general rule of neutrality in governmental benefits.

Second, in its historical analysis the Court made clear that the only cognizable "anti-establishment interests" are those that are grounded in the history of the founding period. Unlike funding for ministers, there is no evidence that funding of religious activity in general was viewed as an improper establishment

of religion, much less funding of religious schools. To the contrary, there is ample evidence that religious schools and other educational efforts *did* receive substantial public funding and other assistance during the early part of our Nation's history.[38]

This aspect of *Locke* makes clear the error of lower court decisions—such as *University of the Cumberlands, Bronx Household of Faith, Teen Ranch* and *Association of Christian Schools International*—that rely upon "anti-establishment interests" that are not grounded in the history of the founding period. Indeed, *Locke* refutes the idea that there exists some general interest in avoiding *any* assistance to religion—in the form of tax-exempt financing, see *University of the Cumberlands, supra,* in the use of publicly owned facilities, see *Bronx Household of Faith, supra,* in contracts with social service agencies that include a religious component in their services, see *Teen Ranch, supra,* or in allowing religion courses taught by religious institutions to satisfy college admissions requirements, see *Ass'n of Christian Schools, supra.* Under the reasoning of *Locke,* none of these interests is a cognizable "anti-establishment interest," because none of

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[38] See, *e.g.*, Jonathan Wright, *Shapers of the Great Debate on the Freedom of Religion: A Biographical Dictionary* 195 (2002) (describing government funding of religious schools under the 1819 Civilization Fund Act, 3 Stat. 516-17 (1819)); *Quick Bear* v. *Leupp*, 210 U.S. 50, 78 (1908) (noting that "the Government for a number of years [has] made contracts for sectarian schools for the education of the Indians," and rejecting First Amendment challenge to that practice). See also Northwest Ordinance (1787) ("Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.").

them has a legitimate grounding in the history of the founding period.

Third, Locke noted *with approval* that the Washington program funded many programs run by religious schools—such as religion classes taken while pursuing a *non*-ministerial degree. *Id.* at 724-25. Indeed, the Washington scholarship program openly allowed "students to attend pervasively religious schools" on state-funded scholarships, as long as they weren't seeking ministerial degrees. *Id.* at 724. Thus, the Court concluded that, in the administration of the Washington program, there was no evidence of a *general* hostility to religion. *Id.*

By negative inference, that reasoning casts further doubt on decisions like *University of the Cumberlands* and others that have treated *Locke* as legitimizing general anti-religious bias in public benefits. Indeed, that reasoning strongly suggests that such evidence would have made the Washington program invalid—either under the Free Exercise Clause, the Equal Protection Clause, or both. See *id.* at 718 (discussing plaintiffs' constitutional theories). As explained below, except where a specific, history-based anti-establishment interest is at stake, those clauses require that government be neutral as between religious and non-religious institutions.

B. Except where religious discrimination is protected by a clear tradition going back to the founding period, the First and Fourteenth Amendments require genuine religious neutrality in the allocation of governmental benefits.

Because *Locke* cannot justify the religious discrimination at issue here, general principles of neutrality control this and analogous cases. That is true whether the government excludes all religious groups from a state benefit, or only certain religious groups.

1. In a string of decisions culminating in *Good News Club* v. *Milford Central School*, this Court has consistently held that there is "no valid Establishment Clause interest" in denying religious groups access to limited public forums. 533 U.S. 98, 113 (2001). And the same principle applies to otherwise generally available funding. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 838-46 (1995). Indeed, allowing religious groups equal access to such funding on neutral terms is "a significant factor in *upholding* governmental programs in the face of Establishment Clause attack[.]" *Good News Club*, 533 U.S. at 114 (quoting *Rosenberger*, 515 U.S. at 839 (1995)) (emphasis added).

Echoes of this neutrality principle are found in more recent Establishment Clause opinions. For example, the four dissenting Justices in *Town of Greece* v. *Galloway* noted that "our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian." 134 S.Ct 1811, 1841-42 (2014). And so too here: "Our public institutions"—including all the governmental bodies that allocate benefits or contracts—"belong no less" to the religious than to the

non-religious. And accordingly, there should be no discrimination between religious and secular institutions in the allocation of such benefits.

2. Settled free speech and free exercise doctrine also requires that both speech and actions undertaken for religious reasons not be treated adversely merely because of their religiosity. See *Good News Club*, 533 U.S. at 114. As this Court has put it, "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status." *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U.S. 872, 877 (1990). Rather, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral [] and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (citing *Smith*, 494 U.S. at 877 (1990)).

This is no less true when religious individuals seek to use religion in pursuing ends that others may pursue through secular means. For example, in *Good News Club*—and without disagreement from the dissent—the Court explained that, if a school district's policy allowed a group to meet with a goal of improving "the welfare of the community" by reading Aesop's Fables, the district must allow other groups to pursue the same goal through religious means. 533 U.S. at 108-110. Likewise, in *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, the Court concluded that, because the school district's policy generally allowed the kind of presentation requested there—a presentation about family values—the school district could not refuse to allow the presentation solely because of its religiosity. 508 U.S. 384, 393-394 (1993).

3. The same principle obviously applies to religious higher education. Consider for example a rule making the tax-exempt status of religious colleges and universities contingent on their hiring professors irrespective of religious belief. Such a rule would not be neutral between religious and secular private colleges: Secular colleges could still use *their* chosen criteria—which would be secular in nature—in making employment decisions, while religious colleges would be unable to use the criteria of greatest importance to their chosen missions. Such a rule would thus penalize colleges for making religiously driven choices—just as anti-Catholic bias fueled earlier, misguided applications of the Blaine Amendments.

This too would violate the First Amendment. As the Court noted in *Hosanna-Tabor*, conditioning governmental benefits on such hiring practices would "interfere[] with the internal governance" of religious schools, "depriving the [school] of control over the selection of those who will personify its beliefs." *Hosanna-Tabor* v. *EEOC*, 132 S.Ct 694, 706 (2012). Further, as Justices Alito and Kagan noted in *Hosanna-Tabor*, "[f]orcing a group to accept certain members may impair [its ability] to express those views, and only those views, that it intends to express." *Id.* at 712 (quoting *Boy Scouts of America* v. *Dale*, 530 U.S. 640, 648 (2000)). Justices Alito and Kagan noted that these principles apply "with special force [] to religious groups"—which plainly includes religious colleges and universities. See *id.*

These concerns are implicated, moreover, whether a government *mandates* that all colleges comply with a chosen norm—in our example, religious neutrality in hiring—or instead uses monetary *incentives* that make it difficult for the school to operate if it refuses

on religious grounds to accept that norm. A broad interpretation of *Locke* would interfere with these rights by making the institutional autonomy of religious organizations subservient to the secular norms of the day.

The Court, moreover, said nothing to the contrary in *Christian Legal Society* v. *Martinez*, in which a public law school was allowed to require a Christian group, as a condition of public benefits, to abandon religious criteria for its leaders. 130 U.S. 2971 (2010). The majority in *Christian Legal Society* addressed the school policy on the assumption that it was applied equally to *all* school groups. *Id.* at 2982-2984. Different considerations would have applied had the decision hinged on whether the group was singled out because of its religious character. See *Good News Club*, 533 U.S. at 114; *Rosenberger.*, 515 U.S. at 828; *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (strict scrutiny for non-neutral treatment of religion).

4. This case is a textbook example of neutrality's importance. Petitioner seeks funding through a grant program akin to the programs at issue in *Rosenberger*, *Good News Club*, and *Lamb's Chapel*. In this case, as in those cases, petitioner seeks to achieve the same end as its secular counterparts: providing a safer playground for children.

Of course, neutrality does not require the state to allow religious benefactors to use state resources for *unapproved* secular purposes—say, a church attempting to use the tire funding here to retrofit cars. But neutrality requires that both secular and religious applicants be able to use the benefit to achieve the same goal—here, resurfacing a playground. And it does not

matter whether religion will be spoken of on the playground any more than it mattered to the on-campus club in *Rosenberger* or the after-school programs in *Good News Club* and *Lamb's Chapel*.

In short, by refusing to allow petitioner to participate in the program at issue here on the same terms as secular organizations, the government discriminates on the basis of religion just as surely as the governments did in those cases. And because there is no cognizable "anti-establishment interest" here—that is, no anti-establishment interest with a pedigree going back to the founding period, as in *Locke*—that discrimination violates the First and Fourteenth Amendments.

C. At a minimum, unless the benefit would directly fund essentially religious activity, the Constitution requires that people and institutions of faith be treated no worse than other people and institutions.

But even if the Court were unwilling to cabin *Locke* in that manner, the Court should still hold that, except for the rare situation presented there, religious neutrality is required unless the government benefit would directly fund essentially religious activity.

Obviously, the causal chain between government benefits and religion can be long or short. For example, no court or commentator of which *amici* are aware disputes that individuals may use tax refunds, Earned Income Tax Credits, or income from a government job to benefit churches. At the other end of the spectrum, no one would suggest that the Constitution permits the federal government to pay directly for printing of churches' proselytizing materials.

From an Establishment Clause perspective, moreover, "direct benefits"—money given directly to a church because of its religiosity—are obviously of greater concern than "incidental benefits"—money that eventually wends its way into the institution's coffers, or is given to the institution for secular reasons. See *Board of Ed.* v. *Mergens*, 496 U.S. 226, 260-61 (1990) (Kennedy, J., concurring in part and in the judgment). But, as even the dissent in *Rosenberger* recognized, *indirect* aid, given evenhandedly to both religious and non-religious individuals, is "simply not within the contemplation of the Establishment Clause's broad prohibition." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 881 (1995) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ, dissenting). That is, indirect assistance does not raise any cognizable anti-establishment interest.

Accordingly, aside from the rare situation in *Locke*, a government benefit that does not directly advance an institution's essentially *religious* mission raises no conceivable Establishment Clause concerns—and thus cannot possibly justify religious discrimination in the allocation of governmental benefits or contracts. For example, a student's use of a taxpayer-funded Pell Grant or scholarship to pursue a mathematics degree at a religious university raises no Establishment Clause concerns whatsoever: Any encounters with religion at the university are not part of the *government's* purpose in awarding the grant or scholarship, which therefore cannot be considered "direct aid" to

the university's essentially religious mission.[39] Accordingly, in such circumstances, to discriminate against a religious organization in access to such a benefit is a clear violation of the First and Fourteenth Amendments. See *Rosenberger*, 515 U.S. at 881 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ, dissenting).[40]

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[39] To be sure, the *college* in that circumstance may well consider training mathematicians as part of its religious mission. But unlike preparing students to conduct religious services, training students to be mathematicians is not *essentially* religious—that is, it has substantial secular significance regardless of its religious significance, and thus would not trigger Establishment Clause scrutiny. See *Locke*, 540 U.S. at 724-25 (noting variety of religious activities the scholarships at issue there could be used for); *Rosenberger*, 515 U.S. at 839 ("We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.").

[40] Indeed, even if the student were using the Pell Grant or scholarship to train for the ministry, there would still be no plausible Establishment Clause violation. That is because a grant or scholarship given to a student would properly be viewed as directly assisting the *student*, not the institution the student attends. See Federal Student Aid, Federal Pell Grants, available at: https://studentaid.ed.gov/sa/types/grants-scholarships/pell (noting funds may be paid directly to the student); *Locke*, 540 U.S. at 724-25 (noting students in the Washington program may attend theology courses) That is no doubt why the majority in *Locke* carefully avoided any suggestion that awarding the scholarship in that case to a student studying for the ministry would actually *violate* the Establishment Clause. To the contrary, the Court noted that with respect to state aid, "the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution." 540 U.S. at 722. There is no federal provision that would require, much less justify, limiting Pell Grants or federal student loans in the manner at issue in *Locke*.

This is precisely such a case of indirect, incidental aid. As petitioner explains more fully, it seeks the funding at issue here for the same purposes as any secular preschool. Pet. Br. 4. And whether or not it receives the funding, its religious and other teachings will go on in exactly the same way. Excluding petitioner from that funding thus violates both the Free Exercise Clause and the Equal Protection Clause, even under the broadest plausible reading of the Establishment Clause.

CONCLUSION

Petitioner and Judge Gruender are correct: Missouri's denial of funding for playground resurfacing merely because petitioner is religious is unconstitutional. In ruling for petitioner, this Court should reaffirm the principles of neutrality mandated by the First and Fourteenth Amendments. This will protect religious colleges and universities from the kind of governmental religious discrimination that would threaten those institutions' viability and, hence, the many benefits they bring to American higher education.

For all these reasons, and those explained by petitioner, the decision below should be reversed.

Respectfully submitted,

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